IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 16-0716

ELAINE MITCHELL, and all others similarly situated,

Plaintiffs and Appellants,

vs.

GLACIER COUNTY and STATE OF MONTANA,

Defendants and Appellees.

APPELLEE, GLACIER COUNTY'S BRIEF

On Appeal From the Montana First Judicial District, Lewis & Clark County

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases Cited: **Page**

Montana Constitution:

Rules:

Statutes:

Treatises:

I. STATEMENT OF ISSUES FOR REVIEW

A. Did the District Court correctly determine that Plaintiffs lack standing to sue the State of Montana and Glacier County?

B. Is the case not ripe and now moot for failure to obtain a stay?

II. STATEMENT OF THE CASE

This case concerns whether Plaintiffs, who are taxpayers and residents of Glacier County, Montana, had standing to bring their claims against Glacier County and the State of Montana. Plaintiffs claim there are deficiencies in Glacier County's management of the funds under its control, identified in Fiscal Year ("FY") 2013 and FY 2014 audits conducted by Denning, Downey & Associates, P.C., certified public accountants from Kalispell, Montana. *See,* Doc. 29, *Second Amended Complaint*, ¶10. Those audits were done in accordance with Mont. Code Ann. §2-7-501, et. seq., Montana's Single Audit Act. Importantly, Plaintiffs conflate recommendations contained in the audits to improve accounting procedures, with "mismanagement of its budget". Doc. 29, ¶12.

Plaintiff, Elaine Mitchell, is a resident of Glacier County and owns and pays taxes on real property in that county. *Appellants' Opening Brief*,

p. 1. The other putative class members are Glacier County taxpayers who have paid their taxes under protest in 2015 and 2016. *Id.*

Plaintiff, Elaine Mitchell, and the putative class members, seek six specific remedies:

1. A declaration that they may continue to pay taxes under protest until Glacier County complies with their demands;

2. A declaration that Glacier County is in violation of laws which implement the "strict accountability provision of the Montana Constitution";

3. An Order requiring the State to perform its duties under the Single Audit Act by withholding public funds from Glacier County;

4. An Order that the State hold Glacier County officials accountable;

5. An Order for the appointment of a receiver to ensure Glacier County complies with the Plaintiffs' demands; and

6. A declaration that Glacier County has violated the Right to Know provision of the State Constitution.[1]

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[1]Plaintiff's Count No. 4 "Right to Know Claim" is moot. Before answering the *Amended Complaint*, Glacier County delivered to Plaintiff, Elaine Mitchell the names of all persons who paid their property taxes under protest claiming the

Glacier County alleged in its Tenth Affirmative Defense that the Plaintiff and putative class had no standing to bring the action. Doc. 30, *Answer to Amended Complaint*, p. 6.

Plaintiff moved for class certification and partial summary judgment. The District Court agreed with Glacier County's contention that the Plaintiffs lacked standing. Doc. 60, *Order Dismissing Case for Lack of Standing* and Appellants' Appendix, pp. 5-13. From the judgment of dismissal, Plaintiffs appealed. Doc. 62. Crucially for this appeal, Plaintiffs did not comply with the strictures of Mont.R.App.P. 22. Plaintiffs did not obtain a stay of the judgment or order of the District Court pending their appeal, for approval of a supersedes bond, or for an order granting an injunction pending appeal.

III. STATEMENT OF FACTS

Glacier County is a political subdivision of the State of Montana. Mont. Code Ann. §7-1-2101. Glacier County is authorized to levy a property tax. Mont. Code Ann. §7-6-2527.

Because it levies property taxes, Glacier County, like all political subdivisions, shall ensure a financial report is made. Mont. Code Ann. §2-

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alleged class action as a basis. Doc. 30, *Answer of Glacier County*, ¶33.

7-503(1). Glacier County must cause an audit to be made of its financial report every two years. Mont. Code Ann. §2-7-503(3)(a). "The audit must cover the entity's preceding 2 fiscal years." *Id.* "The audit must commence within 9 months from the close of the last fiscal year of the audit period" and "must be completed and submitted to the department [Department of Administration] within 1 year from the close of the last fiscal year covered by the audit." *Id.* The fiscal year for counties is July 1 to June 30. Mont. Code Ann. §7-6-610.

The State of Montana Single Audit Act's purposes are as follows:

> The purposes of this part are to:
>
> (a) improve the financial management of local government entities with respect to federal, state, and local financial assistance;
>
> (b) establish uniform requirements for financial reports and audits of local government entities;
>
> (c) ensure constituent interests by determining that compliance with all appropriate statutes and regulations is accomplished;
>
> (d) ensure that the financial condition and operations of the local government entities are reasonably conducted and reported;
>
> (e) ensure that the stewardship of local government entities is conducted in a manner to preserve and protect the public trust;

(f) ensure that local government entities accomplish, with economy and efficiency, the duties and responsibilities of the entities in accordance with the legal requirements imposed and the desires of the public; and

(g) promote the efficient and effective use of audit resources.

Mont. Code Ann. §2-7-502(2).

In accordance with its auditing requirements, Glacier County had its FY 2013 and FY 2014 audits conducted by Denning, Downey & Associates, P.C., certified public accountants from Kalispell, Montana. *See,* Doc. 29, *Second Amended Complaint*, ¶10. The FY 2013 and FY 2014 audits are dated March 27, 2015. Doc. 29, Exhibit 1. Those audits contain a "Schedule of Findings and Questioned Costs". Doc. 29, Ex. 1, pp. 64 - 78. Each of the findings and questioned costs set forth the following elements:

1. Condition;
2. Context;
3. Criteria;
4. Effect;
5. Cause;
6. Recommendation;
7. Views of Responsible Officials and Planned Corrective Action.

Id.

In other words, the audits fulfilled the purposes of the Montana Single Audit Act. The audits set forth areas of recommended improvement to

"improve the financial management" of Glacier County, in compliance with the purposes of Montana's Single Audit Act ("SAA"). Mont. Code Ann. §2-7-502(2)(a). Importantly, each recommended improvement contained the County's "Planned Corrective Action." Nowhere in the audits was it set forth that tax dollars were missing, that increased tax levies were required, or that any tax was inappropriate. It merely served as the template for improving the County's financial management. By way of example, page 79 of the audit delineates the prior audit recommendations, the majority of which were "implemented." Doc. 29, *Second Amended Complaint*, Ex. 1, p. 79.

Plaintiff Elaine Mitchell (sometimes hereafter "Mitchell") and the putative class ("Plaintiffs"), are Glacier County citizens and taxpayers. Doc. 29, *Second Amended Complaint*, ¶¶1-3. Plaintiffs singularly alleged, in response to the "Schedule of Findings and Questioned Costs", that "it is foreseeable that the county's residents and taxpayers would be injured." Doc. 29, ¶26.

In anticipation of filing the *Complaint*, Mitchell protested the entire amount of her second half of 2014 taxes. Doc. 41, *Plaintiffs' Brief in Support of Motion for Partial Summary Judgment, Affidavit of Lawrence A.*

Anderson in Support of Plaintiffs' Motion for Summary Judgment, Ex. 4; and, Appellee Glacier County's Appendix, p. 1. She claimed she was protesting all of her taxes because "County is not in compliance with laws and regulations of budgets (MCA 7-6-4005). I (We) are paying the entire amount under protest based on specified grounds of protest allowed under Section 15-1-402(1)(b)(iii), MCA", citing conditions from the FY 2013 and FY 2014 audits. *Id.*

Following Mitchell's lead, 435 individual Glacier County taxpayers, all alleging the same reasons as Mitchell, protested the entirety of their 2015 taxes[2], totaling over $1 million dollars. Doc. 33, *Defendant Glacier County's Brief in Opposition to Plaintiff's Motion to Certify Class*, Ex. A, pp. 1-2.

Mont. Code Ann. §15-1-402(1) allows for the payment under protest of a property tax, but only "that portion of the property tax or fee protested." *Id.* at Subsection (1)(a). In order to pay property taxes under protest, the protested payment must:

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[2] Plaintiff alleges there are 1,120 Glacier County taxpayers that have protested their 2015 taxes. Actually, there are 435 protesting taxpayers. Those protesting taxpayers own 1,120 differently assessed tax parcels.

(i) be made to the officer authorized to collect it [the Glacier County Treasurer];
(ii) specify the grounds of protest; and,
(iii) **not exceed the difference between the payment for the immediately preceding tax year and the amount owing in the tax year protested** unless a different amount results from the specified grounds of protest, which may include but are not limited to changes in assessment due to reappraisal under 15-7-111.

Mont. Code Ann. §15-1-402(1)(b) (emphasis added).

Mitchell relied upon the above-referenced statute's language, "unless a different amount results from the specified grounds of protest." However, to date, Mitchell has failed to articulate what amount of the tax which she and the other putative class members have paid, is actually under protest, and for what reason, other than "it is foreseeable that the county's residents and taxpayers would be injured." Doc. 29, ¶26.

While each of the 435 protests were made to the Glacier County Treasurer and set forth identical alleged reasons for protest, they all exceeded "the difference between the payment for the immediately preceding tax year in the amount owing and the tax year protested." See, Doc. 32, *Plaintiffs' Brief in Support of Motion to Certify Class, Affidavit of Lawrence A. Anderson in Support of Motion to Certify Class*, Exhibits 1 and 2. In fact, all of the *Payment of Taxes Under Protest* attached to the

Affidavit have the same amounts under "Amount paid" and amount "paid under protest." *Id.* In other words, the Plaintiffs protested **all** of the taxes they have paid, not just the portion that their 2014 or 2015 taxes exceeded their taxes from the preceding year.

Glacier County placed the protested taxes in a separate protest fund in accordance with Mont. Code Ann. §15-1-402(4). The district court dismissed Plaintiffs' action for a lack of standing. This appeal followed. The Plaintiffs did not move for a stay in accordance with Mont.R.App.P. 22, and Glacier County has now delivered the protested tax funds to the appropriate taxing jurisdictions.

IV. STANDARD OF REVIEW

"Standing" is one of several justiciable doctrines which limit Montana courts to deciding only "cases" and "controversies". The determination of a party's standing to maintain an action is a question of law. The Montana Supreme Court reviews such questions *de novo*. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶28-29, 360 Mont. 207, 255 P.3d 80.

V. SUMMARY OF ARGUMENT

A district court lacks power to resolve a case brought by a party without standing - i.e., a personal stake in the outcome - because such a

party presents no actual case or controversy. The district court found, in accordance with Glacier County's argument, that Plaintiff, Elaine Mitchell, failed to demonstrate that she suffered a concrete injury to her property or to her individual constitution or statutory rights sufficient to establish standing under Montana law. Mitchell cites cases where Montana citizens have challenged violations of statutes implementing constitutional mandates. Yet she failed to show she suffered a concrete, identifiable injury.

While it is acknowledged that a taxpayer may have standing to challenge a County's misconduct in handling tax revenues, Mitchell fails to articulate how recommendations for improvement to accounting procedures from a State required audit, resulted in an injury which she has suffered. Mitchell's contention is that she **might** suffer an injury.

Mitchell reaches the illogical conclusion that because Glacier County's audits under the Montana Single Audit Act contain "Recommendation[s]" and "Planned Corrective Action[s]", that "it is foreseeable that Plaintiff will suffer additional property tax burdens." *Second Amended Complaint*, Exhibit 1, Glacier County Audit Report, FY 2013 and FY 2014; and, *Appellants' Opening Brief*, p. 22.

In other words, Plaintiffs **might** suffer additional property taxes. No where in the *Second Amended Complaint* has Mitchell been able to point to any increased tax burden or other injury, conferring standing to her and the putative class. *See*, e.g., *Helena Parents Com'n. v. Lewis & Clark County Comm'rs.*, 277 Mont. 367, 922 P.2d 1140 (1996). The primary purpose of the Montana Single Audit Act ("SAA") is to "improve the financial management of local government entities with respect to Federal, State and local financial assistance." Mont. Code Ann. §2-7-502(2)(a).

Here, Mitchell suggests that she should be able to follow the Attorney General statute because the Department of Administration has not enforced the SAA. The question of whether a suit can be brought in the name of the government, or by public officials, springs naturally from the conclusion that ordinarily citizens and taxpayers do not have standing as such to litigate in the public interest. In order for Mitchell and the putative class to have standing, they must show a concrete injury that is personal to them. *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶25, 366 Mont. 450, 288 P.3d 193.

Finally, Mitchell's *Complaint* fails because her claim is too remote to establish standing, not ripe, and therefore moot. Mitchell did not file a

motion to stay in accordance with Mont.R.App.P. 22, and Glacier County has now delivered the protested tax funds to the appropriate taxing jurisdictions.

VI. ARGUMENT

A. MITCHELL AND THE PUTATIVE CLASS LACK STANDING BECAUSE THEY DO NOT HAVE A PERSONAL STAKE IN THE OUTCOME AND HAVE NOT PRESENTED AN ACTUAL CASE OR CONTROVERSY.

"The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶30, 360 Mont. 207, 255 P.3d 80 (citing *Helena Parents Commn. v. Lewis and Clark County Commrs.*, 277 Mont. 367, 371, 922 P.2d 1140, 1142 (1996)). "Standing requires the plaintiff to have a personal stake in the outcome of the controversy at the commencement of the litigation, whereas mootness doctrine requires this personal stake to continue throughout the litigation."[3] *Id.* (citing *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶23, 353 Mont. 201, 219 P.3d 881; *Friends of the Earth, Inc. v. Laidlaw Envtl.*

[3] Mootness is addressed at IV.C., p. 31, infra.

Servs. (TOC), Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 708–09, 145 L.Ed.2d 610 (2000)).

As Justice Rice wrote, in Montana:

> [t]here are two elements to standing: the case-or controversy requirement imposed by the Montana Constitution, and judicially created prudential limitations imposed for reasons of policy. *Heffernan v. Missoula City Council,* 2011 MT 91, ¶31, 360 Mont. 207, 255 P.3d 80 (citing *Olson v. Dept. of Revenue,* 223 Mont. 464, 469–70, 726 P.2d 1162, 1166 (1986)). The constitutional requirements have been described as "absolute," while the prudential limitations contrasted as "malleable." *United Food & Com. Workers v. Brown Group,* 517 U.S. 544, 551, 116 S.Ct. 1529, 1533–34, 134 L.Ed.2d 758 (1996).

Schoof v. Nesbit, 2014 MT 6, ¶15, 373 Mont. 226, 316 P.3d 831. In discussing that it is not always clear as to whether the standing requirement is constitutionally mandated or prudential, this Court ruled there are some absolutes:

> [h]owever, **at an "irreducible minimum**," the Constitution requires the plaintiff to show that he has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action. *Heffernan,* ¶33; *Valley Forge,* 454 U.S. at 472, 102 S.Ct. at 758. **A "personal stake in the outcome of the controversy at the commencement of the litigation" is required in every case.** *Heffernan,* ¶30.

Id. (emphasis added).

In the case at bar, Mitchell has not alleged any personal stake in the litigation, i.e., a personal injury to a property or civil right. As the district court noted, **the only** allegation of the *Second Amended Complaint* is that, based on the audits at issue ". . . **it is foreseeable that the county's residents and taxpayers would be injured** . . ." , Doc. 29, *Second Amended Complaint*, ¶26 (emphasis added).

Mitchell contends in her Opening Brief, that she alleged County taxpayers would "**foreseeably be injured by the County's fiscal mismanagement and the State's failure to enforce the auditing, budgeting and accounting laws.**" *Plaintiffs' Opening Brief*, p. 14 (emphasis added). However, nowhere in the *Second Amended Complaint*, does that actual allegation exist. It is surmised that is Plaintiff's current characterization of her position. Again, that language is not found in her pleadings.

Notwithstanding the discrepancy regarding allegations between the *Second Amended Complaint* and *Plaintiffs' Opening Brief*, it is respectfully submitted Plaintiffs have not suffered a "threatened injury", let alone a past or present injury. To find standing, an "injury" must be "'concrete,' and not

'abstract.'" *Schoof* at ¶20 (citing *Fed Election Commn. v. Akins*, 524 U.S. 11, 20-23 (1998)).

Here, the only reference to any injury is that it is "foreseeable" that Plaintiffs "would be injured." How Plaintiffs would be injured is an abstract mystery.

In their attempt to bolster their argument they have a threatened injury, Plaintiffs contend their case is similar to several cases regarding plaintiffs who objected to taxes levied or expenditures made, by various Montana political entities. Unlike **all** the cases cited by Plaintiffs, here, there is no objection to the validity of a tax or the use of tax monies by Glacier County. Each of the cases are readily distinguishable:

- *Grossman v. State Dept. of Natural Resources*, 209 Mont. 427, 682 P.2d 1319 (1984). Plaintiff challenged the constitutionality of the various aspects of Montana's coal severance tax bond program.

- *Helena Parents Commn. v. Lewis and Clark County Commrs.*, 277 Mont. 367, 922 P.2d 1140 (1996). Plaintiffs alleged the government would impose tax burdens on them to recoup actual losses on investments.

- *Milligan v. Miles City*, 51 Mont. 374, 153 P. 279 (1915). Plaintiff objected to a tax by Miles City for power infrastructure.

- *Hill v. Rae*, 52 Mont. 378, 156 P. 826 (1916). Taxpayer brought suit to enjoin the state treasurer from issuing, negotiating, or selling bonds.

- *State ex rel. Browning v. Brandjord*, 106 Mont. 395, 81 P.2d 677 (1938). Taxpayer sought injunction that the Public Welfare Board was without authority to make disbursements of funds.

- *Butte-Silver Bow Local Government v. State*, 235 Mont. 398, 768 P.2d 327 (1989). Taxpayer questioned the utilization of State trust funds for purposes other than the reclamation of disturbed lands.

- *Williamson v. Montana Public Service Com'n.*, 2012 MT 32, 364 Mont. 128, 272 P.3d 71. Plaintiffs challenged PSC rates, charges and services that were tax assessments.

The difference between all of the above cases and the issue at bar, is that here, there is no objection to a tax or to government expenditure. Plaintiffs merely suggest it is "foreseeable" that Plaintiffs "would be injured."

The district court recognized the distinction when it found Plaintiffs have not pled any allegation of (a) losses of public funds, (b) higher taxes, or (c) reduced services. Doc. 60, *Order Dismissing Case for Lack of Standing*, pp. 9-10. The district court also held that "Mitchell's disapproval of Glacier County's accounting methods and fiscal management skills does not confer standing." *Id.* That is exactly the point. Mitchell's "foreseeable"

injury, is not an injury at all. She is just disgruntled with Glacier County's audit recommendations under the State of Montana Single Audit Act, intended to "improve the financial management of local government." Mont. Code Ann. §2-7-502(2)(a).

In this context the use of the word "foreseeable" is akin to "might". That does not lead to a conclusion that the "foreseeable" injury is "concrete." For example, if a homeowner has a tree that is adjacent to his neighbor's property, it could be "foreseeable" that the tree may someday fall over and damage the neighbor's property. However, there is no injury, until the tree is blown over in a wind storm and damages the neighbor's fence. There is no "ripe" cause of action that the tree "might" fall over and injure the neighbor's fence. That is why the district court ruled Plaintiffs have not suffered even a threatened concrete injury. The tree is still standing.

The district court found it significant that:

> Mitchell does not challenge Glacier County's authority to collect and spend taxes. Nor does Mitchell allege Glacier County has caused her concrete economic injury by collecting the tax, managing the funds received, or failing to appropriately account for the funds. Absent an allegation of concrete injury to her property, Mitchell's disapproval of Glacier County's accounting methods and fiscal management skills does not confer standing.

Doc. 60, p. 6.

The same is true here. "Under the Montana Constitution, a court lacks power to resolve a case brought by a plaintiff who does not show 'that he has personally been injured or threatened with immediate injury by [an] alleged constitutional or statutory violation.' *Olson v. Dep't of Revenue,* 223 Mont. 464, 470, 726 P.2d 1162, 1166 (1986). We further have recognized the prudential rule that a litigant may assert only his own constitutional rights. *Heffernan v. Missoula City Council,* 2011 MT 91, ¶33, 360 Mont. 207, 255 P.3d 80 (citations omitted)." *In re T.D.H.*, 2015 MT 244, ¶24, 380 Mont. 401, 356 P.3d 457.

The reason the district court dismissed Plaintiffs' action is because they could not point to a concrete injury. That Glacier County might have made mistakes in its budgeting and accounting procedures may be of concern to its taxpayers, but their generalized grievances, do not rise to the level of a judicial controversy.

If there is no net taxation effect to the taxpaying public, no cause of action lies. If that were not the case, every time a local government entity makes a mistake, regardless of the consequences, the government would be involved in constant lawsuits. The proverbial "floodgates of litigation" would always be open.

> "The [United States Supreme] Court's refusal to serve 'as a forum in which to air ... generalized grievances' should be distinguished from situations in which a large group of people share the same injury. In the former situation the Court typically denies standing; in the latter situation the Court has indicated a willingness to adjudicate on the merits." Kuhn, *Stood Up at the Courthouse Door,* 63 Geo. Wash. L.Rev. at 895 (footnotes omitted).

Helena Parents Comm'n v. Lewis & Clark Cty. Comm'rs, 277 Mont. 367, 374, 922 P.2d 1140, 1144 (1996). *See, also*, *Lohmeier v. Gallatin County*, 2006 MT 88, ¶12, 332 Mont. 39, 135 P.3d 775; *Schoof v. Nesbit* at ¶20; *Heffernan v. Missoula City Council* at ¶32; and, *Williamson v. Montana Public Service Com'n.* at ¶28. The public policy behind this rational is obvious and applicable in the present case.

Plaintiffs cannot point to a concrete injury, but only a "hypothetical future injury." *Heffernan* at ¶25. Hypothetical or "theoretical" future injuries are not justiciable:

> The judicial power of Montana's courts is limited to justiciable controversies. *Reichert,* ¶53; *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc.,* 2009 MT 362, ¶22, 353 Mont. 201, 219 P.3d 881. The parties must present a justiciable controversy before a court can consider the merits of an issue. *Dennis v. Brown,* 2005 MT 85, ¶8, 326 Mont. 422, 110 P.3d 17. A justiciable controversy is a threshold requirement for a court to grant relief. *Powder River County v. State,* 2002 MT 259, ¶101, 312 Mont. 198, 60 P.3d 357. In determining whether

a justiciable controversy exists, this Court engages in a three-part analysis:

> First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Powder River, ¶102; *Northfield Ins. Co. v. Mont. Ass'n of Counties,* 2000 MT 256, ¶12, 301 Mont. 472, 10 P.3d 813.

Chipman v. Northwest Healthcare Corp., 2012 MT 242, ¶19, 366 Mont. 450, 288 P.3d 193.

The lack of a concrete injury is manifested in Plaintiffs' attempts to protest their taxes. As set forth in the Statement of Facts, supra, a tax protest cannot be for the entire amount of tax, but rather, only that sum the party believes to be incorrect. As stated in *Dept. of Revenue v. Jarrett*, 216 Mont. 189, 700 P.2d 985 (1985), this Court held: "Section 15-1-402, MCA

sets out the procedure by which a taxpayer may protest the payment of a tax **he believes to be incorrect.**" *Id.* at 191, 700 P.2d at 968 (emphasis added).

Mitchell and the putative class do not claim they believe any of their taxes are incorrect, or that Glacier County illegally spent taxes; they just want to protest taxes in order to leverage their demands that Glacier County capitulate to their wishes. Notwithstanding the language of Mont. Code Ann. §15-1-402(1)(b)(iii), "unless a different amount results from the specified grounds of protest", it cannot be reasonably argued that the tax protest procedure set forth therein should be utilized in order to leverage the Plaintiffs' cause of action against Glacier County.

Moreover, despite her denial, Mitchell is essentially requesting injunctive relief. An injunction is an equitable remedy granted by a court, directed to a party defendant, restraining the defendant in the continuance of such act that cannot be redressed by an action at law. *Black's Dictionary, 5th Edition.* In Montana, an injunction is defined as, ". . . an order requiring a person to refrain from a particular act. The order may be granted by the court in which the action is brought or by a judge thereof and, when made by a judge, be enforced as the order of the court." Mont. Code Ann. §27-19-101. That is exactly what Mitchell is requesting, i.e., that the putative

class be allowed to "pay their property taxes under protest, until the mismanagement of the county's finances are resolved . . . and to prevent expenditures of taxes collected until the county's fiscal deficiencies are resolved." Doc. 41, *Plaintiff's Brief in Support of Partial Summary Judgment*, pp. 9, 11. "Prevent expenditures of taxes collected until the county's fiscal deficiencies are resolved" is the relief requested, i.e., an injunction. Doc. 41, *Plaintiff's Brief in Support of Partial Summary Judgment*, p. 11. *See also*, e.g., Doc. 29, *Second Amended Complaint*, Prayer for Relief Nos. 5 and 9.

Plaintiffs are not protesting their taxes because they are excessive, because they are illegal, improper, unlawfully imposed or excessive as required by Mont. Code Ann. §15-1-406. Plaintiffs' alleged declaratory judgment claim, by their own admission, is to simply have Glacier County do, what is in the alleged class's estimation, a better job of governance.

Essentially, Plaintiffs are requesting that the Court grant injunctive relief to keep Glacier County from utilizing the tax dollars collected for its public purposes. However, injunctive relief is not available because there is no such right under the statutory scheme for protestation of taxes. Plaintiffs' cause of action has nothing to do with protestation of taxes.

Plaintiffs are just demanding the Glacier County officials comply with their personal wishes as taxpayers. Such actions are reserved for the voting booth, and not as an alternative political tool to be utilized when attempting to enforce disenchanted citizens' will upon the County and State.

As a result, Plaintiffs lack standing because they have suffered no concrete personal injury. The district court's dismissal for lack of standing should be affirmed.

B. PLAINTIFFS' OTHER ALLEGED VIOLATIONS OF LAW DO NOT BESTOW A CAUSE OF ACTION ON PLAINTIFFS, BECAUSE THEY CANNOT POINT TO ANY INDIVIDUAL CONCRETE INJURY.

In their Opening Brief, Plaintiffs assert numerous alleged violations of accounting and budgeting procedures by Glacier County. They argue that the "strict accountability" clause of Mont. Const., Art. VIII, Sec. 12, provides them with a private right of action. However, in each circumstance, Plaintiffs never allege any injury as a result of said alleged violations, in accordance with the "concrete injury" requirement to attain standing.

The absence of a concrete injury is fatal to their cause of action. For example, certainly, it is a violation of law to exceed the legislatively

adopted speed limits on Montana's highways. However, if the speeding vehicle does not cause any damage to anyone, it is not actionable by a person observing the speeding vehicle. The speeding driver owed a duty of care. The driver breached that duty by speeding. But, that violation of law did not cause any damage to the observer. The only right of action is by the State of Montana, under traffic laws, not for a private citizen. The same is true here, even under Plaintiffs' other claimed violations of law.

1. Montana Local Government Accounting Laws.

Plaintiffs assert Glacier County did not follow Generally Accepted Accounting Principles ("GAAP") in its accounting procedures. But Plaintiffs do not allege any concrete injury by virtue of Glacier County allegedly not following GAAP.

2. The Local Government Budget Act.

The Local Government Budget Act prescribes budgeting procedures for local governments like Glacier County. But Plaintiffs do not allege any concrete injury suffered by Glacier County's budgeting process.

3. The Montana Single Audit Act ("SAA").

The SAA requires Glacier County to file audits. Among the purposes of the SAA, Plaintiffs highlight that the Act is to help "ensure that the

stewardship of local government entities is conducted in a manner to preserve and protect the public trust." Mont. Code Ann. §2-7-502(e). As the district court found, however, Plaintiffs do not point to any concrete injury whereby Glacier County lost public funds, implemented higher taxes, or reduced services. As there is no actual evidence in the record that Glacier County has violated the public trust, there is no cause of action.

4. Private Attorney General Doctrine.

"The question of whether a suit can be brought in the name of the government, or by public officials, springs naturally from the conclusion that ordinarily citizens and taxpayers do not have standing as such to litigate in the public interest." Wright, *et. al.*, *Federal Practice & Procedure: Jurisdiction2d,* §3531.11. While primarily directed at the State, the private attorney general doctrine does not apply to Plaintiffs' alleged cause of action against Glacier County. In fact, the private attorney general doctrine is not a cause of action at all. It is a claim for relief. The doctrine is merely a means by which Plaintiffs might potentially recover attorney fees. See, e.g., *Montanans for Responsible Use of Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶¶63-67, 296 Mont. 402, 989 P.2d 800; and, *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶¶87-91, 338 Mont.

259, 165 P.3d 1079. It is not a cause of action in and of itself, particularly where Plaintiffs can not point to an individual concrete injury.

5. Justicability.

Plaintiffs' arguments about whether a justiciable controversy exists are also not applicable. The same as argued above, because Plaintiffs have no concrete injury, their alleged cause of action is purely speculative and theoretical. Montana's district courts have no jurisdiction over such actions:

> In *Marbut v. Secretary of State* (1988), 231 Mont. 131, 135, 752 P.2d 148, 150, we further defined the boundaries of a justiciable controversy:
>
> > The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.
>
> In *Gryczan v. State* (1997), 283 Mont. 433, 442, 942 P.2d 112, 117, we set forth the following criteria:
>
> > The test of whether a justiciable controversy exists is: (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interests; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a

> purely political, administrative, philosophical or academic conclusion; and (3) the controversy must be one the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to constitute the legal equivalent of all of them.

Seubert v. Seubert, 2000 MT 241, ¶¶19-20, 301 Mont. 382, 3 P.3d 365.

As also stated in *Marbut*, supra, a case regarding a proposed declaratory judgment action and alleged justiciable controversies:

> While many cases support the rights of taxpayers, citizens or electors to have standing to bring actions against public officials for legal determinations of their respective rights, we have found no case granting standing to a complainant or applicant who shows no injury or threatened injury to himself through the act of a public official.
>
> We hold, therefore, because of a lack of justiciable controversy, this Court has no jurisdiction of the relator's application and proposed complaint.

Marbut v. Sec'y of State, 231 Mont. 131, 135–36, 752 P.2d 148, 151 (1988).

For the same reasons, Plaintiffs have no standing because they have no concrete injury, their alleged claims are theoretical and purely speculative. Plaintiffs make bare allegations that their injury is "foreseeable." That allegation is not adequate.

6. Declaratory Judgments Act.

There are four "Counts" to Plaintiffs' *Second Amended Complaint*: (1) Private Attorney General [doctrine]; (2) Declaratory Judgment Action; (3) Class Claims; and, (4) Right To Know Claims. Doc. 29. As discussed above, the private attorney general doctrine is not an actionable "count", but, rather, a prayer for relief. The Class Claims, were never addressed, as the Plaintiffs' case was dismissed for lack of standing. The Right to Know claim was immediately mooted, as set forth in footnote 1, because the names of all the persons who have paid their property taxes under protest were delivered to Mitchell before her *Second Amended Complaint* was answered. That leaves only the Declaratory Judgment Action (Count No. 2).

Plaintiffs allege their declaratory judgment action is brought, in part, under Mont. Code Ann. §27-8-101. Montana's Uniform Declaratory Judgments Act, is not applicable to this case because the remedy authorized under Montana's taxation statutes "is the exclusive method of obtaining a declaratory judgment concerning a tax authorized by the state or one of its subdivisions. **The remedy authorized by this section supersedes the Uniform Declaratory Judgments Act established in Title 27, chapter 8.**" Mont. Code Ann. §15-1-406 (emphasis added).

In pursuing relief under Mont. Code Ann. §15-1-406, a party must follow the procedures of Title 27, Chapter 8 (Uniform Declaratory Judgments Act), but the only remedy available is as set forth in Mont. Code Ann. §15-1-406. Mont. Code Ann. §15-1-407, sets forth the notice procedures for a class action regarding taxes.

Importantly, Mont. Code Ann. §15-1-406(1) provides:

> An aggrieved taxpayer may bring a declaratory judgment action in the district court seeking a declaration that:
>
> > (a) an administrative rule or method or procedure of assessment or imposition of tax adopted or used by the department is illegal or improper; or
> >
> > (b) a tax authorized by the state or one of its subdivisions was illegally or unlawfully imposed or exceeded the taxing authority of the entity imposing the tax.

The above-referenced statute is indicative of why the district court found Plaintiffs lacked standing as well. The **only** reason you can protest taxes to a County is because the tax was illegally or unlawfully imposed or exceeded the taxing authority of the County. There is no allegation of Plaintiffs' taxes being illegal, unlawfully imposed or that exceeded Glacier County's taxing authority. Plaintiffs' declaratory judgment proceeding, by

their own admission, is to simply have Glacier County do, what is in the alleged class's estimation, a better job of governance.

Essentially, Plaintiffs are requesting that the Court grant injunctive relief to keep Glacier County from utilizing the tax dollars collected for its public purposes. However, injunctive relief is not available because there is no such right under the statutory scheme for protestation of taxes:

> No injunction must be granted by any court or judge to restrain the collection of any tax or any part thereof or to restrain the sale of any property for the nonpayment of taxes except:
>
> > (1) where the tax or the part thereof sought to be enjoined is illegal or is not authorized by law. If the payment of a part of a tax is sought to be enjoined, the other part must be paid before an action can be commenced.
>
> . . .

Mont. Code Ann. §15-1-405(1).

Plaintiffs' causes of action had nothing to do with protestation of taxes. Injunctive relief is not available in protesting taxes. Plaintiffs just wish the Glacier County officials to comply with their wishes as taxpayers. Such actions are reserved for the voting booth, not to be utilized in attempting to enforce citizens' will upon the County. For the specific

reasons of the statutory scheme for protesting taxes utilizing a declaratory judgment action, the Plaintiffs do not have standing as well.

C. THIS MATTER IS MOOT AS PLAINTIFFS HAVE NOT FILED FOR A STAY.

Ripeness and mootness are interrelated. "The standing question thus bears close affinity to questions of ripeness -- whether the harm asserted has matured sufficiently to warrant judicial intervention -- and mootness -- whether the occasion for judicial intervention persists." *Warth v. Seldin*, 422 U.S. 490, 499, n. 10 (1975). "Ripeness and mootness easily could be seen as the time dimensions of standing." *Wright, et. al., Federal Practice & Procedure: Jurisdiction2d,* §3531.12. "Ripeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication, whereas mootness asks whether an injury that has happened is too far beyond a useful remedy." *Reichert v. State, ex. rel., McCulloch*, 2012 MT 111, ¶55, 365 Mont. 92, 278 P.3d 455.

It is acknowledged that standing may rest not only on past or present injury, but also on *threatened* injury. *Gryczan v. State*, 283 Mont. 433, 442-43, 942 P.2d 112, 118 (1997). Here, while standing is discussed, mootness

is the issue. "Mootness is the doctrine of standing set in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Greater Missoula Area Fedn. of Early Childhood Educators v. Childstart, Inc.*, 2009 MT 362, ¶23, 353 Mont. 201, 219 P.3d 888.

Here, lack of standing (personal interest) applies and the dismissal should be affirmed. Even if Plaintiffs' claims were ripe when they were made, the claims are now moot, because Plaintiffs did not file for a stay or supersedeas bond.

The District Court filed its *Order Dismissing Case for Lack of Standing* on November 16, 2016. Doc. 60. Plaintiffs appealed that decision on November 20, 2016. Doc. 62. Significantly, Mitchell did not file a Mont.R.App.P. 22 motion for stay or suspension of the District Court's *Order*. Rule 22 reads:

> (1) Motion for stay in the district court.
>
> > (a) **A party shall file a motion in the district court for any of the following relief:**
> >
> > > **(i) To stay a judgment or order of the district court pending appeal;**
> > >
> > > **(ii) For approval of a supersedeas bond; or**

(iii) For an order suspending, modifying, restoring, or granting an injunction pending appeal.

(b) If the appellant desires a stay of execution, the appellant must, unless the requirement is waived by the opposing party, obtain the district court's approval of a supersedeas bond which shall have sureties or a corporate surety as may be authorized by law. The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest, and damages as the supreme court may adjudge and award. When the judgment or order is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment or order remaining unsatisfied, costs on appeal, interest, and damages for delay, unless the district court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment or order determines the disposition of property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the district court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(c) The district court retains the power to entertain and rule upon a motion filed pursuant to this rule despite the filing of a notice of appeal or the pendency of an appeal.

(d) The district court must promptly enter a written order on a motion filed under this rule and include in findings of fact and conclusions of law, or in a supporting rationale, the relevant facts and legal authority on which the district court's order is

based. A copy of any order made after the filing of a notice of appeal must be promptly filed with the clerk of the supreme court.

(2) Motion in the supreme court.

(a) On the grant or denial of a motion for relief under section (1)(a) of this rule, a motion for relief from the district court order may be filed in the supreme court within 11 days of the date of entry of the district court order. The motion must:

(i) Demonstrate good cause for the relief requested, supported by affidavit;

(ii) Include copies of relevant documents from the record;

(iii) Include a copy of the district court's order issued pursuant to section (1)(d) of this rule; and

(iv) Not exceed 10 pages of text including the affidavit, but exclusive of the documents described in section (2)(a)(ii) and (iii) of this rule.

. . .

Mont.R.App.P. 22 (emphasis added).

Because Mitchell did not file a motion to stay the District Court's *Order* (Rule 22(1)(a)(i)) or to suspend its *Order* pending appeal (Rule 22(1)(a)(iii)), Glacier County distributed the tax dollars held in the protest tax fund to the appropriate taxing jurisdictions of Glacier County.

In Montana, there is no automatic stay. As such, Mitchell's claim is now moot:

> Lastly, it is necessary to address the significance of Evans' failure to request a stay or post a supersedeas bond. The Montana Rules of Appellate Procedure do not require an appellant to seek a stay of execution. *See Kennedy,* ¶34; M.R.App.P. 7 (prior to 2007) (a party "may" apply for a stay); M.R.App.P. 22 (2007 to present) ("[i]f the appellant desires a stay"). The failure to post a supersedeas bond "does not affect the right to an appeal," *Allers v. Willis,* 197 Mont. 499, 508, 643 P.2d 592, 597 (1982), and compliance with the judgment "does not necessarily render the appeal moot," *Turner,* 276 Mont. at 61, 915 P.2d at 803. Nevertheless, this Court has noted on several occasions that failure to post a supersedeas bond "makes the rights of the parties subject to execution, subsequent satisfaction of the judgment and *possible* mootness so far as appeals are concerned." *Henke,* 154 Mont. at 177, 461 P.2d at 451 (emphasis added); *accord Niles v. Carbon County,* 174 Mont. 20, 22, 568 P.2d 524, 525 (1977); *Erdman v. C & C Sales, Inc.,* 176 Mont. 177, 183–84, 577 P.2d 55, 58 (1978); *Moore v. Hardy,* 230 Mont. 158, 162, 748 P.2d 477, 480 (1988). Several of the cases discussed above reflect this fact. **Consequently, while a party is not *required* to seek a stay of execution, "a party choosing not to seek such a stay *runs the risk* of having his appeal become moot."** *Kennedy,* ¶34 (emphasis added); *see also Turner,* 276 Mont. at 60, 915 P.2d at 803 ("A party may not claim an exception to the mootness doctrine where the case has become moot through that party's own failure to seek a stay of the judgment.").

Progressive Direct Ins. Co. v. Stuivenga, 2012 MT 75, ¶45, 364 Mont. 390, 411, 276 P.3d 867, 881 (emphasis added).

This is exactly what happened in the instant case. There is no denying that Mitchell's primary request for relief, as it relates to Glacier County, is that Mitchell and the putative class participants be allowed to "continue to pay their taxes under protest until the County shows it is in compliance with its budgeting duties to ensure strict accountability of all revenues received and money spent." Doc. 29, *Second Amended Complaint*, Prayer for Relief No. 9, p. 8. Setting aside the fact that it is an improper reason to protest taxes in Montana, Mitchell and the putative class ran the risk of the case becoming moot because they did not ask for a stay of the District Court *Order*. Mont. Code Ann. §15-1-402(4)(a) provides that taxes that are protested must be put in the tax protest fund "until the final determination of any action or suit to recover taxes." There was a final determination by the district court in this case. An absolute fact verified by the appeal.

As noted in the *Progressive Direct Ins.* case, while Mitchell was not *required* to seek a stay of execution, because she chose not to seek a stay, she ran the risk of having her appeal become moot. *Kennedy v. Dawson*, 1999 MT 265, ¶34, 296 Mont.430, 989 P.2d 390.

While it is respectfully submitted that Mitchell never had standing in the first place, even if this Court finds that she did have standing, the appeal

has become moot because she is no longer able to protest taxes regarding the budgeting for those particular years. For those reasons as well, the dismissal should be affirmed.

VII. CONCLUSION

Plaintiffs can not show a concrete personal injury granting them standing to bring this action. Their claims were not ripe when filed. Further, even if Plaintiffs had standing, their claims are now moot because they failed to obtain a stay pending appeal. For those reasons, the district court's *Order Dismissing Case for Lack of Standing*, should be affirmed.

DATED this 10th day of April, 2017.

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CERTIFICATE OF COMPLIANCE

I, Kirk D. Evenson, attorney for Appellee, Glacier County, hereby certify that:

(1) Said APPELLEE, GLACIER COUNTY'S BRIEF, filed herewith has a line spacing of 2.0, except for footnotes and quoted, indented material, which have a line spacing of 1.0;

(2) Said APPELLEE, GLACIER COUNTY'S BRIEF, is proportionately spaced and uses a 14 point Times New Roman typeface; and

(3) Said APPELLEE, GLACIER COUNTY'S BRIEF, has a word count of 7,761as counted by WordPerfect X4 for Windows, not including the Table of Contents, Table of Authorities and Certificate of Mailing.

DATED this 10th day of April, 2017.

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CERTIFICATE OF SERVICE

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